Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allocated to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

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To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

The Federal Communications Commission's ("Commission") Third Report and Order is an essential step in implementing the Congressional goal of regulatory parity for all Commercial Mobile Radio Service ("CMRS") providers. The conclusion therein that all CMRS providers are competitive or potentially competitive is supported by both fact and law, and provides the appropriate framework for the Commission's technical, operational, and licensing regulations for CMRS.

The Commission should dismiss the claim by SMR WON and E.F. Johnson Company that all CMRS licensees are not competitive with one another since neither petitioner provides any factual or legal basis for their position. Their position, moreover, is not consistent with actual conditions in the wireless telecommunications market -- a marketplace driven by consumers seeking mobile telecommunications services while on the move, whose needs can be met by local below-800 MHz community repeater operators providing dispatch service, local SMR operators providing dispatch services, wide-area SMRs providing dispatch, paging and/or cellular-type services, cellular providers offering cellular services as well as dispatch services, both broadband and narrowband Personal Communications Services ("PCS") providers that will likely provide an array of mobile communications services including dispatch, or any combination of these services.

SMR WON's claim that the Commission has no authority to auction Specialized Mobile Radio ("SMR") licenses is not supported

by the competitive bidding provisions of the Omnibus Budget Reconciliation Act of 1993 ("The Budget Act"). The wide-area SMR license is an initial license, similar to that granted cellular and PCS providers, on a geographically-defined basis within which to construct and operate a wide-area SMR system. The license is not a modification or renewal of an existing SMR license, and it does not fit into any of the categories of licenses specifically excluded from auctions in the Budget Act.

SMR WON further attempts to impose its own additional requirements on spectrum auctions, e.g., the availability of a clear block of spectrum to which incumbent licensees can be retuned. This is not a legal prerequisite included in the Budget Act's competitive bidding authority, nor would it enhance the public interest. The Commission is not required to set aside such a block of spectrum prior to auctioning a license.

Finally, the Commission properly recognized that all spectrum is not allocated, assigned or used on an equal basis. SMR spectrum is subject to numerous encumbrances -- non-contiguous, non-exclusive channels, co-channel protection requirements -- that are not likewise imposed on cellular and PCS spectrum. Therefore, as long as these encumbrances continue to be placed on SMR licensees, SMR spectrum cannot be attributed on an equal basis with cellular and PCS spectrum.

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I. INTRODUCTION

Pursuant to Section 1.429(f) of the Federal Communications Commission's ("Commission") Rules, Nextel Communications, Inc. ("Nextel") hereby files its Opposition to Petitions For Reconsideration ("Opposition") filed in the above-captioned proceeding.1/ The Petitions seek reconsideration of certain

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1/ On December 21, 1994, several parties filed Petitions For Reconsideration of the Commission's Third Report and Order in this docket ("Petitions"). Nextel's Opposition herein is limited to certain aspects of the Petitions filed by E.F. Johnson Company ("E.F. Johnson") and SMR WON.

aspects of the Commission's Third Report and Order herein, which was adopted August 9, 1994.2/

II. BACKGROUND

The Third Report and Order continues the Commission's implementation of Congress' regulatory parity mandate in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").3/ Because numerous mobile telecommunications services providers were offering substantially similar services that were governed by different regulatory structures, Congress created a new category of mobile radio services, the "Commercial Mobile Radio Service" ("CMRS"). Congress mandated that the Commission establish a regulatory framework within which these CMRS services would be similarly -- but not identically -- regulated.

In the Second Report and Order in this Docket, the Commission implemented the Budget Act's "CMRS" definition by determining which existing mobile services fit into this new regulatory classification.4/ It concluded that, among others, Specialized

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2/ Third Report and Order, GN Docket No. 93-252, FCC 94-212, released September 23, 1994 (hereinafter "Third Report and Order").

3/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

4/ See Second Report and Order, 9 FCC Rcd 1411 (1994) ("Second Report and Order"), at para. 1. The Commission implemented the Congressional definition of "CMRS," encompassing all mobile service providers offering interconnected service to the public, or a substantial portion thereof, on a for-profit basis. Id. at para. 11. Beyond the appropriate classification of mobile services, however, Congress mandated that the Commission "establish the appropriate level of regulation" for CMRS providers. Id. at para. 14. The Commission left these "additional issues raised by the Budget Act, such as revisions to [the Commission's] technical (continued...)

Mobile Radio ("SMR"), cellular, presumptively Personal Communications Services ("PCS"), and paging would be classified as CMRS.5/ Finally, the Second Report and Order determined, in part, the "appropriate level of regulation" for CMRS providers by concluding that the Commission should forbear from imposing certain Title II obligations on CMRS.6/

Once the Commission determined which providers qualified as CMRS, the Commission was required by Congress to create an appropriate symmetrical regulatory framework. The Third Report and Order partially established technical, operational and licensing rules for CMRS by determining (1) which of these CMRS services are competitive and therefore should be subject to similar regulation, and (2) which of the Part 90 and Part 22 rules should be changed,

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4/(...continued)
rules," to future rule making proceedings. Id. at para. 2, 285. See Further Notice of Proposed Rule Making, GN Docket No. 93-252, 9 FCC Rcd 2863 (1994) (FNPRM culminating in the Third Report and Order); Notice of Proposed Rule Making, GN Docket No. 94-90, 9 FCC Rcd 4405 (1994) (elimination of prohibitions on cellular dispatch and wireline entry into SMR); Notice of Proposed Rule Making, GN Docket No. 94-33, 9 FCC Rcd 2164 (1994) (further forbearance from Title II obligations); Notice of Proposed Rule Making and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 4076 (1994) (equal access and interconnection).

5/ Second Report and Order at paras. 90, 102, and 119.

6/ Id. at para. 164. The Commission did not impose Title II obligations where "filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits." Id.

modified or eliminated to provide regulatory symmetry among these competing providers.7/

Nextel has participated in each stage of this proceeding, and as a provider of CMRS services, is particularly interested in eliminating archaic and unnecessary rules and regulations that are no longer applicable to the SMR industry. The rule changes the Commission has begun to implement in the Third Report and Order are necessary to create the level playing field required for wide-area SMRs to effectively compete with their broadband CMRS competitors.8/

III. DISCUSSION

A. The Commission Properly Concluded That All CMRS Are Competitive or Potentially Competitive And Should Be Subject To Comparable Regulation.

Carrying out its Congressional mandate to ensure that all similarly situated providers are similarly regulated, the

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7/ In the Budget Act, Congress not only mandated that the Commission provide comparable operational, technical and licensing rules for all similarly situated CMRS providers, but Congress also mandated that the Commission establish these new rules by August 10, 1994 for licensees previously regulated as private carriers. Budget Act, Section 6002 (d)(3). Congress included this deadline so reclassified private radio service licensees could benefit from the statutory transition period during which they would continue to be regulated as private carriers. See Section 6002 (c)(2)(b) of the Budget Act, which establishes August 10, 1996 as the end of the transition period.

8/ Additional licensing changes are required to achieve regulatory licensing symmetry for SMRs with similar CMRS competitors, including a geographically-defined license instead of individual site-by-site licensing, and exclusive use of a block of contiguous frequencies within that geographic area. In the Third Report and Order, the Commission postponed specific decisions on the appropriate SMR licensing process to a Further Notice Of Proposed Rule Making in PR Docket 93-144. See Third Report and Order at para. 100.

Commission concluded in the Third Report and Order that all CMRS services are competitive or potentially competitive.9/ The conclusion that CMRS services compete, however, does not mean that they offer identical telecommunications services.10/ Dissimilar services or products fulfilling similar consumer needs create a single product market. Therefore, when those products or services are regulated by the government, the regulation must be comparable for all those services and products to ensure that "economic forces -- not regulation -- [] shape the development of the CMRS market."11/

In the Third Report and Order, the Commission reached its decision by concluding that "the appropriate analytical framework for determining whether services are substantially similar is to assess whether licensees in those services actually compete or potentially compete to meet the needs and demands of consumers."12/ Applying well-established principles of anti-

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9/ Third Report and Order at para. 94.

10/ As the Commission pointed out, simply because cellular and paging are not identical products, does not mean that the two services do not compete with one another. Third Report and Order at paras. 60-62. Cellular and paging providers themselves perceive that they are in competition with one another, and they market their services accordingly. A customer may choose one over the other for any number of reasons -- e.g., quality of service, service offerings, or price. Similarly, once wide-area SMRs and cellular licensees are marketing dispatch services to consumers (see fn. 27, infra.), a customer may choose an integrated package of services from the wide-area SMR or the cellular provider, or an individual service from the wide-area SMR provider, the cellular provider, or the traditional SMR provider.

11/ Third Report and Order at para. 29.

12/ Id. at para. 12.

trust law as articulated by the United States Supreme Court, the Commission concluded that the wireless telecommunications competitive marketplace consists of those services which meet the consumer's desire to communicate on a real-time basis while on the move.13/ Fulfilling this need is the consumer's motive for purchasing wireless telecommunications products. Because all CMRS products fulfill that same consumer need, albeit in different ways, all are "reasonably interchangeable" in the eyes of the consumer and therefore compete in the same market.14/

E.F. Johnson and SMR WON seek reconsideration of the Commission's conclusion that all CMRS services are competitive and should therefore be subject to similar regulation.15/ E.F. Johnson claims that the Commission's market definition will improperly impose "burdensome" common carrier requirements on "traditional 'local' SMR licensees."16/ SMR WON claims that the Commission's conclusion is an "administratively convenient market definition" that "ignore[s] actual market conditions."17/

The Commission's conclusion is correct. It neither ignores "actual market conditions" nor imposes unnecessary and overly

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13/ Id. at para. 58.

14/ Id. at paras. 60-62; see also paras. 48-50, discussing the "reasonable interchangeability" test as set forth in United States v. E.I. du Pont de Nemours, 351 U.S. 377 (1956).

15/ E.F. Johnson Petition For Reconsideration at pp. 2-3; SMR WON Petition For Partial Reconsideration at pp. 13-17.

16/ E.F. Johnson at p. 2.

17/ SMR WON at p. 13.

burdensome regulations on SMR licensees. "Actual market conditions" in the wireless telecommunications industry were the very reason Congress enacted the CMRS provisions of the Budget Act. The introduction of wide-area SMR services, the eventual entry of PCS providers, and other existing private and common carrier services, such as paging, resulted in a marketplace that encompassed numerous services, fulfilling similar consumer needs, which were subject to significantly different regulatory schemes. The Budget Act sought to remedy this disparate regulation.

1. E.F. Johnson's Claim Is Untimely and Should Be Dismissed.

E.F. Johnson's petition is a transparent attempt to once more contest the Commission's conclusion in the Second Report and Order that all interconnected SMRs should be classified as CMRS.18/ It is the classification of SMRs as CMRS in the Second Report and Order that results in the imposition of Title II obligations on traditional/local SMRs.19/ The Third Report and Order does not address the regulatory classification of mobile services, and therefore is not the appropriate forum for E.F. Johnson's petition.

The Commission is considering the issue raised by E.F. Johnson

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18/ E.F. Johnson made this same argument in its comments in the Second Report and Order proceeding, claiming that a CMRS definition "that does not distinguish between traditional SMR systems and mobile telephone-like mobile communications services . . . will subject all SMRs, including those with limited channel capacity and coverage area, to the same type of regulatory burdens as common carriers . . ." Comments of E.F. Johnson, filed November 8, 1993, in GN Docket No. 93-252, at p. 4.

19/ See E.F. Johnson at p. 2. See also Second Report and Order at para. 14 ("the [Budget Act] ensures that all CMRS providers will be subject to certain key requirements of Title II. . .").

in Petitions For Reconsideration of the Second Report and Order.20/ E.F. Johnson had the opportunity to seek reconsideration of this issue in the proper forum.21/ Its failure to do so does not justify its attempt to recharacterize the issue and raise it in this proceeding. Therefore, E.F. Johnson's petition for reconsideration of this issue is untimely and should be dismissed.22/

2. SMR WON's Claim That Trunked SMRs Are A Single Product Market Is Not Supported By Fact Or Law.

SMR WON offers no support for its position that trunked SMRs are a single product market and do not compete with other types of dispatch services, cellular service, integrated wireless services, narrowband PCS, broadband PCS, or paging. SMR WON relies solely on the conclusions of the U. S. Department of Justice ("DOJ") which compared trunked SMR only to cellular and conventional SMR, ignoring its similarities and differences in

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20/ See, e.g., Petition For Reconsideration of the American Mobile Telecommunications Association, filed May 19, 1994 in GN Docket No. 93-252.

21/ See Federal Communications Commission Public Notice of May 25, 1994, listing all Petitions For Reconsideration of the Second Report and Order. E.F. Johnson is not among those parties included in the Public Notice.

22/ In any case, the Commission's decision in the Third Report and Order that all CMRS services are competitive or potentially competitive does not impose unwarranted common carrier burdens on traditional/local SMR licensees, as E.F. Johnson asserts. Congress gave the Commission discretion to impose dissimilar, or "differential," regulations where necessary to promote competition in the CMRS marketplace. See H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993). This discretion addresses E.F. Johnson's concerns and was acknowledged in the Third Report and Order. See Third Report and Order at paras. 15 and 79.

relation to other CMRS services.23/ Moreover, DOJ did not cite a single court case or legal theory for its finding that trunked SMRs are a single product market.24/

Relying on its narrow product market definition, SMR WON alleges that Nextel has "control" of the SMR market based on Nextel's alleged "control" of a large percentage of all 800 MHz SMR channels in Washington State, Oregon, and Idaho.25/ SMR WON's figures are ingenuously but incorrectly calculated, misleading and ultimately irrelevant to any determination of market "control."

First, the numbers are misleading because they do not account for structural differences between local, traditional SMR systems and wide-area digital SMR systems. By ignoring these differences, SMR WON is comparing apples and oranges. Traditional, local SMR licensees operate outmoded, 20-year old technology on high-power, high-tower stations which use a single frequency over a 70-mile radius. When a customer is using that frequency, no other use can be made of it within that 70-mile area.

In contrast to the inefficient frequency use of traditional, high-power SMR stations, Nextel's wide-area SMR systems employ numerous low-tower, low-power stations within a geographic region, frequently reusing a single channel with call hand-off

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23/ See U.S. v. Motorola, Inc. & Nextel Communications, Inc.; Proposed Final Judgment and Competitive Impact Statement, 59 FR 55705 (1994) ("CIS").

24/ Compare the Commission's extensive anti-trust analysis in the Third Report and Order at paras. 37-79.

25/ SMR WON at p. 15.

capabilities. Because Part 90 of the Rules requires that each SMR base station be individually licensed with its own call sign, a wide-area SMR like Nextel will have more licenses within the same geographic area than a traditional SMR. The wide-area SMR licenses, although numerous, include many of the same channels in a given geographic area and thereby permit more efficient use of those channels. This "re-licensing" of the same channels results in a large number of licenses reusing a discrete amount of spectrum.

If a cellular-type licensing scheme were in place for wide-area SMR systems, a single wide-area system would be granted only one license for the geographic area in which SMR WON's members have multiple licenses. The Commission has concluded that a single, geographic area license is required for wide-area SMR systems and is addressing its implementation in the Further Notice of Proposed Rule Making ("FNPRM") in PR Docket No. 93-144.26/ SMR WON ignores the realities of the current licensing process and has thereby overstated Nextel's relative spectrum position by a substantial factor.

The second convenient mischaracterization in SMR WON's calculation of SMR channels is its irrelevance to the overall CMRS marketplace. Nextel's spectrum position is far smaller than that

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26/ FCC 94-271, released November 4, 1994. In the Third Report and Order, the Commission concluded that, in light of the single license required for cellular and PCS systems, wide-area SMRs are competitively disadvantaged by the Part 90 requirement that they license each and every base station in a wide-area system. Third Report and Order at para. 96.

of its broadband CMRS competitors -- cellular and PCS. By arriving at a narrow definition of the market, SMR WON makes exactly the same error that it claims the Commission -- and impliedly Congress -- have done in defining the market: crafted an "administratively convenient market definition" which then allows SMR WON to proffer statistics which, in the actual CMRS marketplace, are irrelevant.

Trunked, interconnected SMRs, even if providing primarily dispatch services, are part of the CMRS marketplace because they will be, if they are not already, subject to competition from other CMRS services, e.g., wide-area SMR services (which provide an integrated package of services including dispatch), narrowband and/or broadband PCS offerings that will likely include dispatch services, and cellular licensees who may soon be offering dispatch services in conjunction with their mobile telephone service.27/ Classifications based on regulatory distinctions, on the manner in which a technology operates on the spectrum, or on the manner in which the Commission licenses a service are not the appropriate determinants of a product market.

As the Commission properly concluded, the marketplace consists of those products that consumers can reasonably interchange.28/

27/ See Notice of Proposed Rule Making, GN Docket No. 94-90, 9 FCC Rcd 4405 (1994) wherein the Commission, pursuant to Congress' elimination of the statutory ban, proposes to eliminate the current ban on cellular dispatch. In this same proceeding, the Commission likewise proposed to eliminate the ban on wireline telephone companies being eligible to be SMR licensees.

28/ Even if the Commission were to agree with SMR WON that the product market is limited to dispatch services, the Commission must include dispatch services provided below 800 MHz -- competing (continued...)

If the price of one service increases significantly or the supply becomes too limited, it is these interchangeable products that consumers will turn to for service. As technology continues to advance, as new products and services are introduced into the market, and as regulatory distinctions are eradicated, consumers will have a broad range of wireless telecommunications products from which to choose -- some servicing all of the customer's needs, some serving only particular needs, but all nonetheless competing for that consumer's dollar.

B. The Budget Act Authorizes The Commission To Auction Wide-Area SMR Licenses.

In the Third Report and Order, the Commission concluded that future SMR licensing -- both the upper 200-channel block and the "lower 80" channels -- would occur through competitive bidding.29/ Due to the number of mutually exclusive applications the Commission expects to be filed for SMR operations in the future, the use of competitive bidding will "ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process" and there will be no delays in the licensing process.30/

28/(...continued)
dispatch services that are conveniently ignored by SMR WON. According to the Commission's 1993 Annual Report, there are some 14 million analog dispatch units in operation in the U.S., not including public safety, of which SMR WON claims 1.8 million in the SMR service. See F.C.C. Annual Report, Fiscal Year 1993, Private Radio Statistics, page 63.

29/ Third Report and Order at para. 341.

30/ Id. at paras. 341-342.

SMR WON argues that the Commission has no statutory authority to auction the wide-area SMR licenses.31/ It mistakenly attempts to define the license, based on a Major Trading Area ("MTA"), as one conferring only a geographic area and the right to expand therein, and concludes that such a license does not fall within the Commission's auction authority since it is not an auction of "spectrum."32/ Congress limited its auction authority, according to SMR WON, to those instances that would not "displace currently licensed services."33/

SMR WON's arguments are not supported by the Budget Act. Congress authorized competitive bidding for initial, mutually exclusive license applications for services that will be resold to subscribers.34/ Congress specifically excluded certain licenses: those for unlicensed services, those where only one

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31/ SMR WON at p. 4. Interestingly, the Southeastern SMR Association, et al., a group of local SMRs which is now a part of SMR WON, argued in its Reply Comments in this proceeding that auction of the MTA licenses would be the "more likely avenue for license assignment if [the] block were created." Comments of Southeastern SMR Association, et al., filed July 12, 1994, at p. 29. It is only after the Commission has concluded that the auction of MTA block licenses is required for regulatory parity that these local SMR operators, looking for any means to oppose SMR licensing changes, argue that the auction is an illegal "avenue." The Southeastern SMR Association has not been the only local SMR to support the use of auctions for the MTA license. See also Reply Comments, filed July 12, 1994, by Triangle Communications, Inc. at pp. 6-7; by Jorgia Electronics, Inc. at p. 6; by Robert Fetterman d/b/a R.F. Communications at p. 6.

32/ Id. at p. 7.

33/ Id. at p. 6.

34/ Budget Act, Section 309 (j)(2).

application is filed, and renewal and modification applications.35/ Congress did not include among the exceptions those licenses that might "displace currently licensed services." On the contrary, auctions of the PCS licenses will displace numerous microwave licensees.36/

Due to the minimal spectrum available in the upper 200 channels within any MTA, SMR WON claims that the Commission is simply establishing precedent for itself to "re-license and reallocate any and all licenses, bands and services below 20 GHz which have already been licensed."37/ The Commission is not using its auction authority to re-license existing SMR operators. The MTA-based authorization is a new license for wide-area SMRs necessary to achieve regulatory symmetry with the geographically-based, single call sign licensing presently used for other broadband CMRS services. The auction should ensure that the MTA license is awarded to the bidder who values it most, while at the same time, eliminating the archaic, administratively burdensome,38/ and inefficient current licensing scheme as well

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35/ H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 253 (1993).

36/ See, e.g., Notice of Proposed Rule Making, 7 FCC Rcd 1542 (1992) at para. 9; Second Report and Order, 8 FCC Rcd 6495 (1993) at para. 3.

37/ SMR WON at p. 8.

38/ In 1993, the Commission received 64,108 requests for authorization at 800 MHz alone. See F.C.C. Annual Report, Fiscal Year 1993, Private Radio Statistics, p. 63. In addition, the Commission received thousands of requests for Special Temporary Authorizations ("STA") to operate at 800 MHz. While the use of geographic-based licensing for wide-area SMRs will not eliminate

(continued...)

as avoiding unnecessary delays in the provision of more efficient service to the public. Where there are mutually exclusive applications for the same wide-area SMR license, the Commission is wholly within its authority to select among them by competitive bidding.39/

SMR WON further argues that the proposed auctions are improper because they fail to "identif[y] adequate, vacant spectrum suitable for the SMR industry."40/ SMR WON, in its arrogance, states that *it* "would not even consider a wide-area auction proposal which did not, as a preliminary matter, clearly delineate a block of sufficient vacant spectrum suitable for SMR communications" for relocation of incumbents.41/

Nowhere in the Budget Act's auction authority is this a prerequisite to auctioning spectrum. Certainly, in the PCS auctions, had such vacant spectrum been available, the Commission would have avoided the relocation of microwave licensees by

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38/(...continued)
all of these requests for authorization, it will significantly reduce the number of requests, thereby easing the administrative burden on the Commission and the American public.

39/ Congress did not explicitly exclude SMR licenses from competitive bidding, and the Commission has previously recognized its authority to auction SMR licenses where mutually exclusive applications are pending. See Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2230 (1994) at para. 63.

40/ SMR WON at p. 9. Such a condition could not possibly be a prerequisite to spectrum auctions since there is essentially no vacant spectrum available for any mobile communications operations. If vacant spectrum were available for auctioning or for relocation of incumbents, the Commission would not have required relocation of 2 GHz microwave users in the PCS proceeding.

41/ Id. at p. 11.

licensing PCS on the vacant spectrum. Since there was no spectrum available, the Commission relocated microwave licensees, but there was no set-aside block of spectrum reserved for them. On the contrary, microwave licensees were relocated to other frequency bands allocated for microwave operations.42/

As explained by the Personal Communications Industry Association ("PCIA"), the industry participant which essentially crafted the microwave relocation transition plan, not all microwave licensees will be relocated. Rather, "there will be exceptions" to relocation in those instances where the licensee would not be assured comparable facilities.43/ The Commission did not require a clear block of spectrum solely for relocated microwave licensees, and there is no statutory basis for SMR WON's position.

Finally, SMR WON argues that the proposed MTA license auction is flawed because "only one applicant, Nextel, would be capable of bidding."44/ As explained in our comments on the Further Notice of

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42/ Second Report and Order, 8 FCC Rcd 6495 (1993).

43/ See Comments of Telocator, filed June 8, 1992, on the Commission's Notice of Proposed Rule Making in ET Docket No. 92-9, at pp. 5-6.

44/ SMR WON at p. 12. Implicit in SMR WON's argument is that Nextel proposed the FNPRM to auction wide-area licenses. Contrary to SMR WON's assertions, Nextel did not propose auctioning the MTA block licenses. Nextel proposed two licensing methods: (1) grant licenses to existing wide-area SMR licensees in the MTA according to the number of revenue-producing mobile units operated by those licensees in that MTA on a pro rata basis, and (2) grant only one license to an existing wide-area SMR in the MTA, based upon a voluntary settlement among the existing wide-area SMR licensees. See Comments of Nextel, filed June 20, 1994, at pp. 17-18; Reply Comments of Nextel, filed July 11, 1994, at pp. 11-12.

(continued...)

Proposed Rule Making in PR Docket No. 93-144, Nextel is not the only potential bidder who might succeed in an MTA auction. The Commission has not proposed limiting the eligibility of bidding participants.

Moreover, as the Commission noted, relocation is not the only method for clearing the 200-channel block.45/ The MTA licensee may buy out the incumbents, sign franchise agreements with the incumbents, coordinate operations with the incumbents, as well as relocate incumbents. However, to assure regulatory symmetry, the MTA licensee must have the capability to use mandatory retuning of incumbents to other 800 MHz spectrum.

C. The Commission Properly Concluded That It Should Attribute No More Than 10 MHz Of SMR Spectrum For Purposes Of The CMRS Spectrum Cap.

In the Third Report and Order, the Commission concluded that no SMR licensee will be attributed more than 10 MHz of SMR spectrum for purposes of the CMRS spectrum aggregation limit.46/ Given the significant differences between SMR and cellular spectrum allocation, the Commission's conclusion is in the public interest.

44/(...continued)
Moreover, the Commission's decision to grant MTA licenses to wide-area SMRs and to auction those licenses grew out of the Commission's implementation of CMRS regulation, as required by the Budget Act. The Commission first set the stage by determining the scope of the CMRS classification. Then, the Commission began crafting a symmetrical regulatory framework for these services. The FNPRM is the Commission's implementation of the specific SMR licensing rules that are required to ensure that all broadband CMRS services are subject to comparable regulations.

45/ FNPRM at para. 35.

46/ Third Report and Order at para. 275.

As explained by numerous commenters in the Third Report and Order proceeding, the current differences in licensing SMR, cellular and PCS spectrum dictate that all CMRS spectrum cannot be counted on an equivalent basis for spectrum cap purposes.47/ For cellular and broadband PCS, the Commission assigns large blocks of contiguous spectrum to a limited number of licensees within Commission-defined service areas. Each cellular licensee is assigned 25 MHz of spectrum divisible into 416 30 kHz paired channels for use within its geographic area. PCS licensees will be granted either a 10 or a 30 MHz block of exclusive-use, contiguous spectrum throughout either an MTA or a Basic Trading Area ("BTA").

In contrast, 800 MHz SMR licensees are assigned spectrum one or five channels at a time. These channels, moreover, are not assigned on a contiguous basis throughout a geographic area, and SMR licensees have not been permitted to obtain additional channels until demonstrating adequate loading, i.e., that it is serving at least 70 mobile units on every authorized channel. Because the SMR channels are not assigned on a contiguous, exclusive-use basis in a geographic area like cellular and PCS spectrum, the SMR licensee must continually provide co-channel interference protection as specified by the Commission's rules. These co-channel protection rules prevent the wide-area SMR licensee from using all of its channels in a portion of its market, and the non-contiguous

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47/ See Reply Comments, filed July 11, 1994 by Comcast Corporation at p. 3; by Motorola, Inc. at p. 12; by Dial Page, Inc. at p. 5; and by Nextel at pp. 30-32.

assignment of channels forces the wide-area SMR to "piece together" a package of assignments in order to configure its multiple base station frequency reuse digital architecture. All of these distinctions provide substantial support for the Commission's conclusion that SMR spectrum cannot be counted on a one-for-one basis with other CMRS spectrum.48/

IV. CONCLUSION

The Commission's actions in the Third Report and Order properly recognizes that all CMRS services, although not identical, are competitive or potentially competitive with one another because they all fulfill the consumer's desire to have communications services available while they are on the move. It is this interchangeability that defines the competitive marketplace in the wireless telecommunications industry.

By auctioning contiguous blocks of SMR spectrum on an MTA basis, the Commission specifically reduces the disparity which currently exists between broadband CMRS services. Wide-area SMRs will no longer be forced to license their operations on a site-by-site basis, and will be allowed at least some of the flexibility in spectrum usage that is currently provided to cellular and PCS licensees. Coupled with mandatory retuning, these changes will

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48/ The Commission's proposed MTA block license is a move toward providing equivalent spectrum among CMRS services. In the event the Commission establishes a 10 MHz block of contiguous, exclusive-use spectrum for wide-area SMR providers, and the auction winner migrated all incumbents, it would not be inappropriate for the Commission to revisit this issue. However, as long as any CMRS provider's spectrum is not assigned on an geographically-defined, exclusive-use, contiguous basis it cannot be equated with cellular and PCS spectrum.

further promote competition in the CMRS marketplace and thereby fulfill Congress' intentions in the Budget Act.

Respectfully submitted,

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Dated: January 20, 1995

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 20th day of January, 1995, I caused a copy of the attached Opposition to Petitions for Reconsideration to be served by U.S. Mail or hand delivery to the following:

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